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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 352

JOHN B. BEARD and HELEN B. BEARD,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

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ARGUMENT.

The opinion of the court below does not contain a full and fair statement of the facts.

Contrary to respondent's statement that "The court below made a full statement of the facts" (Br. 2-3),* and with all due deference and respect, we are constrained to say that the opinion of the court below

*Br. refers to respondent's brief in opposition.

does not contain a full and fair statement of the facts for the reason that certain important testimony was omitted, that other evidence tending to support the district court's judgment was questioned or not properly considered, while evidence tending to bolster the conclusion of the court below was stressed.

In the first place, the opinion completely omits consideration of the *purpose and intent of the taxpayer* in acquiring the lands in question, yet the purpose and intent of a taxpayer in acquiring property in cases of this kind is an important criterion. *Smith v. Dunn*, 224 F. 2d 353 (C.A. 5th). The evidence clearly demonstrates that the taxpayer was purchasing these lands as an investment in farm property at a time when prices were depressed, considered it a safe investment, that he had in mind farming the property, selling it as farm land, or subdividing and selling it as residential lots, whichever might prove to be the most advantageous manner of realizing on his investment. (R. 99-101, 211, 213.) In point of fact he did farm these lands for varying periods (R. 103, 144, 145, 157, 217, 218) while awaiting the outcome of circumstances which might dictate the best manner of realizing on his investment at which time he would liquidate and invest his capital elsewhere. These seemingly important facts are not mentioned in the opinion of the court below.

Nor does the opinion of the court below or respondent in its summary of the facts consider the circumstances surrounding the purchase of these lands by the taxpayer. He did not go out and seek or pro-

move or solicit the purchase of these properties, but to the contrary owners came to him and solicited his purchase because they wanted to dispose of the lands for reasons personal to them. (R. 102, 118, 143, 153, 154.) These circumstances in some measure at least show a lack of activity on the part of the taxpayer and indicate a purchase for investment purposes rather than a purchase for the purpose of entering the real estate business. The opinion makes no reference whatsoever to these circumstances.

In the opinion (Pet. VIII, IX) and respondent's summary of the facts (Br. 3, 4, 5) reference is made to "an adjacent tract" and "other developments" presumably referring to other subdivisions in the area; but the opinion does not state that the entire area in which these lands were located was primarily and principally a farming area, that all these tracts were being operated as farms when acquired, and for the most part were farmed for varying periods by the taxpayer. (R. 97, 103, 113, 114, 115, 136, 144-145, 152, 157, 217, 218, 231-232.) The evidence concerning the "other developments" (R. 205-208, 230-231) is rather sketchy and limited and not of sufficient importance to have a bearing on the case, while the testimony that this was primarily a farming area was substantial and properly characterizes the area and does have some bearing on the circumstances, yet it is not mentioned in the opinion.

The conclusion of the court of appeals that "the area of taxpayers' properties was a natural place for subdivision and well adaptable for that purpose"

(Pet. XIII, Br. 10), is true only in retrospect and was not an established fact in the mind of the taxpayer at the time of purchase.

The opinion of the court below states that "roads were put in by L. & I." (Pet. IX, Br. 5.) This is an error. The roads were put in by the county. (R. 119.) The word "company" appeared in the original transcript but this was an error in transcription and was changed to the word "county" by the reporter by communication from him to the clerk of the court of appeals dated May 18, 1957.

In referring to Wilson No. 1 the opinion states it "had been platted for subdivision by a former owner in 1924". (Pet. VIII, Br. 5.) But the court below did not mention the fact that this was still open crop land when purchased (R. 102), and that taxpayer was not aware of the fact it had been platted at the time he negotiated the purchase and that this fact would not have influenced him in buying the land. (R. 186-187.)

In referring to Thousand Oaks the opinion states "and some street work and some of the curbs put in by taxpayer directly". (Pet. IX, Br. 6.) This is incorrect. Actually all the street work and all the curbs were put in under the supervision of L. & I. and taxpayer had nothing to do with arranging for the installation of streets and curbs; all he did was to pay some of the expenses of this work directly, while L. & I. paid the balance and reimbursed itself from sales' proceeds under the agency agreement. (R. 112, 113, 151.) The point is that taxpayer did not himself

arrange for, supervise or direct the street and curb work but left that to an independent broker, L. & I.

In summarizing the evidence the court below stated that taxpayer testified he "spent something like one to five per cent of his time on his real estate property . . ." (Pet. VII, Br. 3.) This evidence is reported at pages 164-165 of reporter's transcript. Reading the question and answer as a whole, considering the demeanor of the witness, his manner, and the fact that there is other testimony in the record tending to refute this statement, the trial court could very well have given little, if any, weight or importance to this statement. For example; when the taxpayer first started answering the question, he thought the time spent on his properties "was practically nothing compared with my regular activities". The importance of a witness' demeanor is well expressed by the late Judge Jerome Frank in *Broadcast Music Inc. v. Havana Madrid Restaurant Corporation,* 175 F. 2d 77-78, as follows:

> "The tones of voice and hesitation of speech . . . often makes a sentence mean the reverse of what the words signify. The demeanor of a witness, his gestures and intonations all constitute 'lost evidence' so far as an upper court is concerned."

On the other hand there is substantial evidence that during the tax years in question the taxpayer did nothing more than sign deeds and contracts and receive his share of proceeds from the sales of these properties. (R. 105, 108, 117, 141, 150, 158, 167, 168, 187, 243.) In reviewing the record in a case of this

kind the court might well have stressed and given more consideration to such testimony; it did not see nor hear the witness and could not weigh or evaluate his testimony; the trial judge did see and hear the witness and was in a position to weigh and evaluate the testimony.

In its discussion of the written agency agreements the court below seems to have questioned their genuineness and effectiveness by characterizing one agreement as "bearing only the signature of Walter Beard, president of L. & I.", another as "undated and unsigned", and that "no written agreements were introduced for Wilson No. 1 or Wilson No. 2 . . . and none were produced for the Alta Vista trust properties". (Pet. XI, Br. 8.) As a matter of fact the evidence demonstrates that all these written agency agreements were genuine and acted upon by the parties, that all taxpayers' properties handled by L. & I. were developed and sold strictly in accordance with the provisions of these agreements without supervision or control by the taxpayer; that all agreements submitted in evidence were properly identified and admitted without objection (Ex. 2, R. 121; Ex. 3, R. 141; Ex. 4, R. 150); and while taxpayer could not find copies of agreements for some of the tracts he testified to the effect that there were agreements for all the tracts handled by L. & I. (R. 109, 111, 112, 116, 120, 121, 140, 141, 147, 148, 149, 150, 151, 155, 156, 160, 161, 191, 197, 243, 244, 246.) The trial judge who saw and heard the witness said, "These agreements delegated the activity pretty substantially to the agent,

even down to a large measure of control". (Pet. XXIX.) So apparently he thought they were genuine and complied with by the parties. A few excerpts from the record may serve to illustrate what we have said here:

(R. 112)

"We (taxpayers) had an agency agreement with L. & I. on everything we sold after 1945, and they had the exclusive sales activity on everything sold after 1945."

(R. 111-112)

"Q. This testimony you have given relating to the circumstances under which L. & I. handled the sales of these tracts from 1945 on, does that apply to all the tracts generally?

"A. Well, generally, yes—we had an agency agreement with L. & I. on everything we sold after 1945, and they had the exclusive sales activity on everything we sold after 1945."

(R. 109)

". . . and without agreement with L. & I. . . . in fact, the way all of our operations with L. & I. were handled, L. & I. collected all the money; they made the sales; they handled the . . . actual development of the property, . . . arranging for the street work; they recorded the maps; they filed the maps; they had the maps drawn; they collected all the moneys . . ."

If the taxpayer was "an unusually frank man" and "did not in any way try to deceive or cover up or gloss any of the facts" (Pet. XXVII), these written agency agreements were genuine and effective

and complied with by all the parties and all properties of the taxpayer handled by L. & I. were handled in accordance with the provisions of these agreements, and if the court below had accepted this as a fact there would have been no need for characterizing the agreements as "undated," "unsigned", "not produced", "bearing only the signature of , . . president of L. & I." To thus question the validity of these agreements and that there were agreements for all properties of the taxpayer handled by L. & I. is to cast a reflection on the credibility of the taxpayer and is an unnecessary affront to him by a court which has neither seen nor heard him testify. There are good reasons why an appellate court which neither sees nor hears a witness should not attempt to weigh evidence or to give a construction of the facts different from that which the trial court might reasonably apply.

Further, the opinion of the court below neither discusses nor considers the distinction between sales through an agent and sales through an independent broker. There is an abundance of testimony that the improvement, development and sales work were done principally and primarily through independent brokers without supervision or control by the taxpayer (R. 105, 108, 109, 117, 141, 150, 151, 160, 161, 179, 191, 243, 244.) The following excerpts from the record may serve to illustrate our point:

(R. 243)

"We (L. & I.) had an exclusive agency in which we had the control over the development, the sell-

ing of the property, the collection of the moneys, we had in essence, I would say, a total control of the marketing of the property and selling it."

(R. 243)

"Well, he (Mr. Beard) didn't function in any activity. We (Ix & I.) handled the thing exclusively, the policy, the marketing and the selling, promotion, everything."

(R. 105)

"Q. Now, did you have anything to do with the sales that were made?

"A. No; nothing whatsoever, other than to sign the deeds, and I think he (Hopkins) even he arranged for the title work and the survey and all that work in connection with the sale."

(R. 117)

"He (Hopkins) made all the contacts and all of the handled all of the details of the sales."

* * *

For the reasons given above we do not think that the court below made a proper review of the evidence and did not review it from the standpoint of attempting to ascertain whether there was any substantial evidence to support the judgment of the district court.

* * *

In purporting to give a reason for reversing the district court, the court below said: "The overall picture of the family enterprises and taxpayers' association therewith convinces us that the purchase, subdividing, and sale of real estate was sufficiently extensive to

being his activity within the definition of the statute" (Pet. XIV) and the respondent seems to rely on this statement also for upholding the decision of the court of appeals. (Br. 11.) We are at a loss to understand the significance or relevancy of such a statement or how it could have a bearing on the determination of this case. One family company was a railroad hauling freight; that had no relation to taxpayer's personal real estate investments. Another family company (Modesto Terminal) operated the warehouses and terminal facilities for the railroad; that had no relation to taxpayer's personal real estate investments in this case. Another was a refrigerating company and a fourth was a retail ice and appliance store; none of these were related by nature or otherwise to taxpayer's real estate holdings. The argument might have been made that taxpayer developed these subdivisions for the purpose of expanding the family water company, but the record is devoid of any such evidence to that effect. This leaves only L. & I. and that was primarily a holding or parent company for the other family organizations and as a sideline conducted a real estate brokerage business handling taxpayer's properties among others. Taxpayer was one of ten brothers and sisters in these family companies, owning one-tenth of the stock and serving as one of ten directors. The owner of one-tenth of the stock of a corporation or one of ten directors could hardly control and dominate a corporation. If he was a "guiding spirit" or exercised any domination or control it was in respect to the two family companies he man-

aged, namely, the Refrigerating Company and City Ice and Fuel. His relationship with the family companies was no different than if he had been one of ten directors and a one-tenth stockholder with nine other people who were strangers rather than blood relations. The income tax law involved here makes no distinction between dealings among brothers and sisters and dealings between strangers. If the above quoted statement is the premise on which the decision of the court below rests, then there is no evidence to support it.

CONCLUSION.

We respectfully submit that the petition for a writ of certiorari should be granted.

Dated, Modesto, California,
October 20, 1958.

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